A Tale of Two Hardships:

Use and Area Variances

New Hampshire Office of Energy & Planning

Fall Conference

October 28, 2006

BENJAMIN FROST, AICP, ESQ.
New Hampshire Housing
32 Constitution Drive
Bedford, NH 03110

P.O. Box 5087
Manchester, NH 03108-5087

b.frost@nhhfa.org
www.nhhfa.org

“A happy life consists not in the absence, but in the mastery of hardships.”

Helen Keller

New Variance Standard: *Simplex* and *Boccia*

I. The variance will not be contrary to the public interest.

II. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

A. Applicant seeking **use variance** - *Simplex* analysis

i. The zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.

ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.

iii. The variance would not injure the public or private rights of others.

B. Applicant seeking **area (dimensional) variance** - *Boccia* analysis

i. An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.

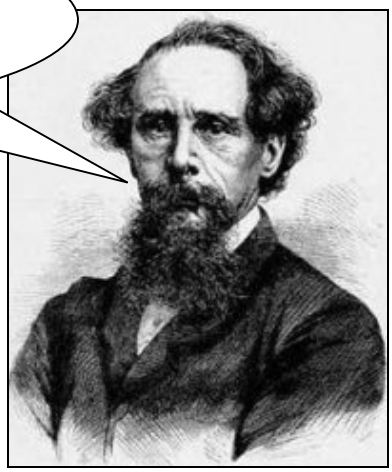
ii. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

III. The variance is consistent with the spirit of the ordinance.

IV. Substantial justice is done.

V. The value of surrounding properties will not be diminished.

"...we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met."



It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way--in short, we were trying to believe the New Hampshire Supreme Court when they said they were trying to help us...

WHY IS A VARIANCE?

> The statutory language derives from the Standard State Zoning Enabling Act, which was drafted by the United States Department of Commerce in the 1920's as model zoning enabling legislation. See 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.02, at 293 (3d. ed. 2000). According to one commentator, "It is probably safe to say that no single statutory provision has been the source of more litigation . . . or more misunderstanding." Boccia v. Portsmouth, 151 N.H. 85 (2004).

The variance is a necessity in the administration of your zoning ordinance. Just as a zoning ordinance is illegal without a board of adjustment, an ordinance cannot seek to fetter the ability of the board to grant variances.[1]

Some might regard the variance as an evil perpetrated upon hapless boards of adjustment, unwitting abutters, and frustrated staff. Others regard it as the last protection of civil liberties against a grasping and ever-expanding government. The truth, as usual, is probably somewhere in the middle.

Variances do run counter to the notion of comprehensive planning—the planning board develops a master plan, the municipality adopts a zoning ordinance to fulfill the master plan's vision, and the board of adjustment wrestles with requests for variances that fly in the face of that vision. Balanced against the planning board's vision and the will of the majority are the constitutional rights of the individual. Remember: "…nor shall the government take private property for public use without just compensation." The U.S. Constitution instructs our understanding of the purpose of variances: they are to protect the individual against the unreasonable exercise of power by the government, even if that government is your town meeting.

---

[1] It is my opinion that provisions of a zoning ordinance that identify other portions of the ordinance as unsuitable for variances are in fact, illegal. The power of the ZBA to grant or deny variances comes not from the ordinance, but from the zoning enabling statute. The ordinance cannot limit the ZBA's power to grant variances to the terms of the ordinance.

USE VARIANCES

The Modern Era Begins: Simplex

In January 2001, the New Hampshire Supreme Court rocked the previously placid world of the state's many zoning boards of adjustment with its opinion in Simplex Technologies, Inc. v. Town of Newington[2], which dramatically changed the standard for granting zoning variances. While zoning boards of adjustment must pay heed to this decision, the case also had wider impact that significantly affected planning boards.

Simplex wanted to use industrially zoned land for commercial purposes (a bookstore and a restaurant) in an area where surrounding properties were almost exclusively used for commercial purposes. Properties to the north were in a commercial zone (having been earlier rezoned from industrial), and properties to the south were in the same industrial zone as the Simplex property, but were used commercially (the Court was fuzzy on how they became commercial, though). The ZBA denied the variance, finding that none of the five criteria for granting a variance had been met.

The criteria come from RSA 674:33, I(b): (1) that the variance would not be contrary to the public interest; (2) that literal enforcement of the ordinance would result in an unnecessary hardship; (3) that the variance would be consistent with the spirit of the ordinance; and (4) that substantial justice would be done by granting the variance. Through its decisions, starting with Gelinas v. Portsmouth[3], the Supreme Court has added a fifth criterion: (5) that granting the variance would not cause diminution of surrounding property values.

The Old Hardship Test: The trial court affirmed the ZBA's denial, on the basis that the hardship criterion had not been met. On appeal, the Supreme Court observed that

> Our recent case law suggests that in seeking a variance, the hardship requirement is the most difficult to meet. To establish hardship, property owners must show that an ordinance unduly restricts the use of their land. See Governor's Island Club v. Gilford, 124 N.H. 126, 130, [A.2d 716] 467 A.2d 246, 248 (1983). In Governor's Island, we overturned the trial Court's order affirming the ZBA's grant of a variance, stating: ***"For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land."*** Id. (emphasis added)

The Supreme Court evaluated the law of variance hardship, and determined that they had been getting it wrong for years. They found that their own pronouncements on the hardship standard

[2] 145 N.H. 727 (2001)
[3] 97 N.H. 248 (1952)

over the last twenty years did not comport with even earlier decisions. The Court also found that their more recent decisions "were inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate," and that those decisions did not jibe with constitutional balances between public regulation of nuisances versus private property rights.[4]

The New Hardship Test: To correct its wayward opinions, the Court concluded, "We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property." The Court then announced the new three-part standard by which owners can demonstrate unnecessary hardship:

> ***(1) A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;***
> ***(2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and***
> ***(3) The variance would not injure the public or private rights of others.***

The Simplex case was remanded to the trial court for further proceedings. Because the Supreme Court's opinion only addressed the hardship criterion, and the fact that the Newington ZBA had denied for other reasons, the applicant ultimately failed in its attempt at commercial development by means of zoning variance.

The Implications of Simplex: Zoning boards throughout the state were forced to deal with a sudden shift in how they deal with variances. Of course, everyone who has worked with ZBAs knows that if the hardship criterion under the old standard had been applied rigorously, then variances would have been very rare indeed. It seems that the Court was targeting the contradiction between providing an avenue for reasonable relief, and erecting an almost impassable barrier in front of it. Apparently recognizing that contradiction, the Court's hardship standard in Simplex comports with the balancing test already applied by many zoning boards.

In some ways, however, the Court also applied an "equal protection" standard—implicit in the opinion is the concept that different property owners within a particular zone should be treated similarly. This standard is found in the Court's second criterion, calling for demonstration of a "fair and substantial relationship" between the ordinance's general purpose and its application to a particular parcel of land. The use of this language raises the bar for municipalities in defending their ordinances against legal challenge—the Court will no longer accept the existence of a

[4] The Court's opinion in Simplex had been foreshadowed almost ten years earlier by the dissent of Justice Sherman Horton in Gray Rocks Land Trust v. Hebron, 136 N.H. 239 (1992). In his dissent, Horton called for a reappraisal of the Court's approach to hardship, and urged greater deference to the Constitutional rights of property owners.

rational relationship between a zoning ordinance and the object of its regulation as sufficient proof that the ordinance is constitutional.

Simplex and Zoning Boards: The difficulty faced by ZBAs has been to properly interpret this standard, especially what constitutes a "fair and substantial relationship." It's not clear that there is any guiding case law (the Court looked back favorably on older decisions, but created a new rule). Remember, though, that Simplex was limited to a consideration of hardship, so if a variance application fails on other grounds (e.g., "spirit" of the ordinance), then the new hardship standard will have no bearing. To succeed in a variance request, the applicant must demonstrate that all criteria have been met.

Simplex and Planning Boards: The unspoken impact of this case is that planning boards need to reexamine the zoning ordinances and amendments they propose, and more fundamentally, the master plans they develop and adopt. The statement that zoning ordinances should reflect the neighborhoods they seek to regulate is central to the Simplex Court's understanding of the role of the master plan. If the master plan identifies a neighborhood as being inappropriately used and suggests that zoning could be used to effect a change, then the planning board could develop a zoning ordinance that would slowly work out that change. Planning boards should also reexamine their zoning maps to determine if the boundaries make sense, in light of the master plan and any language in the zoning ordinance expressing the purpose of a particular zone. If there's a logical gap between those elements of local planning, it's time to make some adjustments.

A Twist in the Road: Rancourt

In Rancourt v. Manchester[5], the Supreme Court had its first opportunity to revisit its Simplex decision. Although the case poses some difficulties of interpretation, it nonetheless offers some instructive information on how ZBAs should look at the question of a property's uniqueness relative to hardship.

In 2000, the Gately's bought a three (+/-) acre lot in Manchester, after correctly determining that stabling horses was a permitted use in the relevant district. In 2001, they contracted to build a single family house, then sought a permit to build a barn to stable two horses. To their surprise, they were informed that the city had recently amended its zoning ordinance to prohibit livestock (including horses) in the district. They filed for a variance, which the ZBA granted; Rancourt, an abutter, appealed to the superior court, and the court upheld the grant of variance. Rancourt appealed to the Supreme Court.

When going over the standard for a variance, the Supreme Court recounted its Simplex decision and inexplicably omitted one of the criteria. It recited the variance criteria only as those shown in RSA 674:33, I(b), failing to mention the "diminution of values" standard (originally codified

[5] 149 N.H. 51 (2003)

at R. L., c. 51, s. 62 III,1; see Fortuna v. Manchester[6]; despite a subsequent recodification that deleted the "diminution" criterion, the Court nonetheless kept it as part of its standard on variances in Gelinas). This omission appears to have been a simple error, as the correct full slate of criteria do appear in subsequent opinions.

Additionally confusing matters in Rancourt was the Court's seeming single-mindedness about the reasonableness of the owner's proposed use of the property as the goal of the hardship inquiry:

> "Whereas before Simplex, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, … after Simplex, hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." In the first prong of the Simplex test, "special conditions" are referred to as the property's "unique setting ... in its environment."

Although in Simplex the Court generally ignored the conditions of the property for which the variance was sought, and instead focused on its neighborhood, in Rancourt, the Court looked at how the property differed from others in the neighborhood (larger, hence could accommodate livestock more readily and in such a way as to meet standards in other zones in the City), and also described in approving tones the nature of the property where the horses were proposed to be stabled ("thickly wooded buffer"). So it seems that an analysis of "setting of the property in its environment" should entertain considerations both of what the property itself is like, and what's going on in the surrounding neighborhood. The conclusion that could be drawn from this is that if the conditions are right, then a use must be deemed reasonable—and hence, hardship must be present.

This misconception was later addressed by the special concurrence of Justices Duggan and Dalianas in Bacon v. Enfield,[7] which also became the basis for the Court's subsequent important opinion in Boccia v. Portsmouth,[8] in which the court established a separate test for area variances. With regard to reasonableness of use, though, the Bacon concurrence expressly maintained that "even under the Simplex standard, merely demonstrating that a proposed use is a 'reasonable use' is insufficient to override a zoning ordinance."[9] This position has been clearly adopted in more recent opinions.

A Return to the Straight and Narrow? Garrison

In Garrison v. Henniker,[10] a company named Green Mountain Explosives (GME) sought variances to establish an explosives storage and blending facility centrally located on eight

[6] 95 N.H. 211, 211 (1948).
[7] 150 N.H. 468 (2004).
[8] 151 N.H. 85 (2004).
[9] 150 N.H. 468, 476 (2004).
[10] ___ N.H. ___ (2006-85).

contiguous parcels totaling 1,617 acres in a rural residential zone (apparently, such a large buffer is required by the federal Bureau of Alcohol, Tobacco and Firearms). The ZBA heard testimony both from the applicant's experts as well as its own, and granted the variances. Abutters moved for a rehearing, which was denied, then they appealed to superior court.

The trial court reversed the ZBA's grant of the variances, determining that the ZBA only found that the property was ideally suited to the applicant's use and that the property was otherwise difficult to develop, but not that the property was different from any other property in the same zoning district. The trial court said of the property, "[w]hile its size may make it uniquely appropriate for GME's business, that does not make it unique for zoning purposes."

On appeal, the Supreme Court agreed with the trial court, holding that GME had failed to prove that the property was unique—"…the record merely demonstrates that the proposed site was large, difficult to develop because of its topography and relatively isolated location, and ideally suited to GME's needs because it could provide a buffer zone as required by the AFT regulations. These factors alone, however, do not distinguish GME's proposed site from any other rural land in the area." The Court rejected GME's suggestion that it was the conditions of the property itself that rendered the proposed use reasonable. The Court also seemed to temper some of its variance decisions in the past few years by requiring a direct comparison of the property in question with those that surround it, whereas before the Court seemed more interested in examining the "reasonableness" of the proposed use.

The Supreme Court accepted the trial court's notion that the property had not been shown to be "unique for zoning purposes."[11] The Court said that GME identified "no evidence in the record that would demonstrate that the proposed site was different from any other property in the rural residential district.

Of perhaps greater importance in Garrison is the manner in which the Court distinguished its holding in Rancourt. GME extensively identified parallels in the situations between the properties involved in the two cases: their large size, relative inaccessibility, and the existence of a buffer, suggesting that these were "special conditions of the property" providing a basis for granting a variance. The Court was unmoved by this argument, recounting the factors in Rancourt that led to it affirming the grant of a variance. There, the property was easily distinguished from those around it—its size, configuration, and condition were different—whereas in Garrison, the Court said that "[t]he evidence presented by GME simply did not demonstrate that its proposed site was similarly unique in its setting."

As variance hardship law continues to evolve, this case should stand as an important marker for what the Court meant when it said in Simplex that applicants could establish hardship first by showing that "a zoning restriction as applied to their property interferes with their reasonable use

[11] This conditional language—not unique *for zoning purposes*—allows the court to distinguish this situation from others in which every parcel of land may be deemed by the law to be unique. In breaches of contracts for the sale of land, for example, courts generally have the power to order specific performance. That is, the court can order the sale of the land, rather than awarding damages, because land is deemed to be unique.

of the property, considering the unique setting of the property in its environment." Look beyond the parcel itself and compare it with others nearby that are similarly situated—if it is uniquely constrained so as to significantly limit uses that are permitted, then the use proposed by the applicant may be reasonable. In a sense, the Court is relying upon the property owner's judgment about what can reasonably be done with the property—it's only that the owner has to also demonstrate that other, permitted uses are uniquely constrained. Here, the Supreme Court reviewed the trial court's order, which stated that "'there was no evidence in the record that the property at issue is different from other property zoning rural residential.' Based upon the language of the order, we are simply not persuaded that the superior court failed to apply the correct standard for unnecessary hardship."

VERITAS

Are you having a difficult time reconciling the Court's opinions in Rancourt and Garrison? You be the judge: on the one hand, you have a residential property owner who wants a couple horses, and who may have been misled by municipal officials regarding the use prior to constructing a barn. On the other hand, you have an out-of-state corporation that wants to build a "barn" for its dynamite. Don't underestimate the power of being a sympathetic plaintiff...or an unsympathetic one.

AREA VARIANCES

The Origin of the Species: Bacon

In what I once described as a "deliciously complex opinion", in Bacon v. Enfield,[12] the Supreme Court gave signs of an impending second significant change in variance law that would address (though not necessarily clarify) some of the aspects of hardship delineated three years before in Simplex. Here, the court affirmed a superior court decision upholding the denial of a variance by the Enfield ZBA. The facts, briefly, are these: Bacon owned a shorefront home. The structure was legally non-conforming, as it did not comply a 50-foot shoreland setback enacted subsequent to the construction of the building. Bacon hired a contractor to install a propane boiler and an attached shed to contain it--she was converting from wood and electric heat. The shed was on the shore side of the house. Neighbors complained after the construction was complete, and the application for a variance (presumably necessary before she could get a building permit for what she had already had done) was the result. The ZBA denied the variance, finding with a touch of irony that it "(1) did not meet the *current criterion of hardship*; (2) violated the spirit of the

[12] 150 N.H. 468 (2004).

zoning ordinance; and (3) was not in the public interest." (ironic italics added). The ZBA denied a request for rehearing. Bacon appealed.

The superior court upheld the ZBA's decision, finding that there were reasonable alternatives to the use proposed by Bacon, and that there was a clear relationship between the purposes of the zoning ordinance generally and the specific 50-foot setback. The court said that granting the variance "would have some effect on the public rights of others in that it increases congestion along the shoreline and reduces minimally the filtration of runoff into the lake." (Remember that lack of impact upon the public and private rights of others is one of the prongs of the hardship criterion in Simplex.) The court also determined that the variance requested was not within the spirit of the ordinance, and that granting it would not do substantial justice. Bacon appealed.

Writing for the court, Chief Justice Broderick gave great deference to the superior court and focused solely on the court's treatment of the "spirit of the ordinance." To quote:

> ...the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general. While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance. . . . .We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon's part, and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA "acted reasonabl[y] and lawfully" in denying the variance.

Having come to this conclusion with regard to the spirit of the ordinance, Broderick chose not to address the other variance criteria. The trouble with Broderick's opinion was that no other justices agreed with him. Duggan wrote a concurrence, with which Dalianis joined, coming to the same conclusion but for different reasons. Nadeau wrote a dissent, with which Brock (sitting by special appointment) joined.

The Duggan Concurrence. Although agreeing with Broderick's conclusion, Justice Duggan preferred to focus on the hardship criterion of variances. He did so for reasons that most ZBA members will appreciate: to give you guidance. Duggan noted that hardship is the highest hurdle to surmount in a variance request, and that as a result of Simplex there was confusion. He said, "because Simplex recently changed the unnecessary hardship standard, we believe that analysis of the unnecessary hardship factor in this case will provide guidance to trial courts and zoning boards when reviewing requests for variances."

Duggan engaged in a fairly wide-ranging and extensively researched opinion, citing sources from other jurisdictions and academia. Despite the court's recent contrary treatment of a variance in Rancourt, Duggan felt that "Even under the Simplex standard, merely demonstrating that a proposed use is a "reasonable use" is insufficient to override a zoning ordinance. Such a broad reading of Simplex would undermine the power of local communities to regulate land use. Variances are, and remain, the exception to otherwise valid land use regulations." He then suggested that variance analyses should reflect the kinds of considerations used when examining whether or not there has been a constitutional taking of private property (under either the state or federal constitutions). Finally, and perhaps most importantly, he stated that "use" and "area/dimensional" variances should be treated differently. While the use variance goes to the heart of the purpose of zoning—the segregation of land according to use—area variances instead deal with matters that are to be regarded as "incidental limitations to a permitted use..." Merging these two lines of thought, he concluded "in considering whether to grant an area variance, courts and zoning boards must balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in Simplex."

Regarding the Simplex hardship prong that addresses the unique setting of the property in its environment, Duggan called for a comparison of the subject property to others similarly situated—which is really a pre-Simplex hardship test. He cited Rancourt as standing for this proposition (a variance for horses in a residential zone was O.K. because of the country setting, the unusual size of the lot, and the existence of a thick wooded buffer).

In conclusion, Duggan found that Bacon had failed to demonstrate unnecessary hardship. He suggested that there were other reasonable alternatives to the proposal (this too, harkens back to a pre-Simplex analysis), finding that the proposal was a request of convenience, not one of necessity. Finally, he felt that there was nothing unique about Bacon's property, in relation to other lakeside homes in the same district--they were similarly burdened by the setback requirement.

But remember, joining with Duggan was only Dalianis. Now for the dissent...

Nadeau's Dissent. The court's Simplex opinion, which was unanimously decided (Brock, Broderick, Dalianis, and Horton—upon whose Grey Rocks dissent the Simplex opinion was largely based)), was written by Justice Nadeau. The bottom line of Simplex can be found in this quotation from it, and appearing in Nadeau's dissent here: "...there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." And so, the pendulum swung back toward property rights.

Here, Nadeau made fairly quick work in dismissing Broderick's opinion, suggesting that the "public interests" would only be affected by the proposal in a "de minimis" manner that was not

worthy of the court's consideration. He then focused the bulk of his energy on Duggan's concurrence. The Simplex hardship test contains the following prong: [the variance should be granted if] "a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment." In the current case, Nadeau stated that after Simplex, a comparison of "similarly situated properties" was no longer necessary. Rather, only those considerations that pertain to the property itself should be entertained. In support of this, Nadeau cited Rancourt, stating that among the factual findings—"country setting, unusually large lot size, the configuration of the lot, and thick wooded buffer"—only the lot size dealt with a comparison with other properties. [Note that Nadeau only explicitly addressed one prong of the hardship test—uniqueness—and purposely leaves the other two. Given the language of his quick dismissal of Broderick's opinion, however, it is reasonable to conclude that Nadeau would have found the proposal to be consistent with the other two prongs: no fair and substantial relationship between the ordinance and the specific restriction, and no injury to the private or public rights of others.]

So what should we make of this case? At the time it was decided, the multiple opinions left the reader looking for the swing vote. In retrospect, however, it is clear that Bacon foretold of changes in variance law, as two of the justices leaned that way and a third, Nadeau, was retiring. His replacement by Richard Galway, whose superior court opinion in Simplex was overturned by the Supreme Court when it created the new hardship standard, was just a short time away.

The Area Variance Is Established: Boccia

Since the Supreme Court handed down its startling Simplex decision, zoning board members had watched the Court's subsequent decisions with wariness and fascination. On May 25, 2004, the other shoe dropped, in the form of the Court's opinion in Boccia v. City of Portsmouth. In Boccia, the Court concluded that it must distinguish between use variances and dimensional variances, observing that the hardship criteria of Simplex could only logically be applied to uses of land.

The Boccia case involved a long and convoluted history, but the important elements can be summarized fairly simply. A Portsmouth property owner, Raymond Ramsey, wanted to develop his land for a 100-room hotel, opposite the existing Marriot Hotel on Market Street Extension. After a legal battle that resulted in a court-ordered zoning change allowing the hotel use, Ramsey then applied to the ZBA for six variances. These included lot size, frontage, front yard setback, two side yard setbacks, and rear yard setback. The ZBA granted the variances, which was appealed by the owner of the land underlying the abutting Marriot Hotel, Michael Boccia. The superior court remanded the decision to the ZBA for further proceedings to clarify its opinion in light of Simplex. Applying the Simplex hardship criteria the ZBA again granted the variances, which was again appealed by Boccia. The superior court upheld the ZBA's decision to grant the variances. Boccia appealed to the Supreme Court.

The Boccia decision was written by the most recent appointee to the Court, Richard Galway. Recall that it was his superior court decision in Simplex that was reversed by the Supreme Court-not because Galway had misapplied the law, but because the Supreme Court had misstated the law of hardship and was attempting to correct it in Simplex. In Boccia, Galway borrowed heavily from the concurring opinion of Justices Duggan and Dalianis in the Court's confusing and complex Bacon decision. In their Bacon concurrence, Duggan and Dalianis advocated for a view of hardship that would distinguish between use and area variances. Five months later, that view became the law.

Writing for the Court in Boccia, Galway said:

> Here, the [superior] court upheld the ZBA's finding that the use of the property as a 100-room hotel was reasonable, given the unique setting of the property in its environment. In so doing, the court applied the Simplex test for unnecessary hardship to an area variance. The question remains, however, whether this Simplex test governs the unnecessary hardship prong when seeking an area variance. We do not believe it does.

Having already reviewed how it has looked upon area variances in the past, and especially focusing on the Bacon concurrence, the Court concluded: "...we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met."

Drawing on other jurisdictions, the Court developed the following two-prong test for finding hardship in area variances:

(1) whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property; and

(2) whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

In applying the first prong, the Court said that the applicant does not need to establish that without the variance the property would be valueless—rather, that practical considerations make it difficult or impossible to implement a permitted use, given the special conditions of the property. In this case, the Court found that this prong had been met by the developer, owing to the configuration of the property and the presence of wetlands.

The second prong, the Court explained, calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined. The Court found that the record in this case was insufficient to determine if this prong had been met, and remanded for further proceedings.

This is a watershed case that will be discussed for years to come; its practical implications are yet untold. Although the first prong of the new area variance hardship test is legally thorny (exactly what constitutes "special conditions of the property"?—more later), it seems that the second prong could be more problematic for zoning boards to grapple with. Each request for an area variance will have the potential to result in a fishing expedition, as angry abutters hire experts to develop "reasonable" alternatives to counter the "reasonable" proposal of the applicant. In the end, it seems that the side with the greater resources (meaning the capacity to hire the best experts) will win out.

Thus, the question that remained open was how to assess the use proposed by the applicant in light of the second prong of the area variance hardship test. In the Boccia case, the proposal was for a 100-unit hotel. The second prong identifies "the benefit sought by the applicant" as the measure of reasonableness-does this mean that the ZBA should be looking at all hotel alternatives, or just 100-unit hotel alternatives? Reading between the lines, it seemed that the Court would prefer to start with 100-unit alternatives, but then look at others and review the financial impact. The test would be something like this: can you get the applicant an approximation of the specific use that's proposed (rather than the general use allowed) without imposing an "undue" financial burden.

Also, in this case, the Court took pains to remind the reader that hardship is only one of five parts of the variance consideration. In this case, however, the lower court had already found that the other four parts of the variance test (which are not different for use or area variances) had been met. In Simplex, the ZBA had found against the applicant on several of the hardship criteria, but weirdly enough, only the hardship criterion had been appealed.

"How could they have known?": Vigeant

In 2003, the Hudson ZBA denied the variance request that was the subject of this case, Vigeant v. Hudson. Much changed in the variance world after that, and it is possible that the zoning board members would have treated its decision differently if they had had the benefit of the Supreme Court's Bacon and Boccia wisdom at hand.

In this case, the owner desired to construct a 5-unit mulit-family housing complex on a 1.6-acre parcel in the Business zone, where multi-family uses are permitted. The lot is long and relatively narrow (770 feet long x 129 feet at its widest) and is generally rectangular in shape. There is a 50-foot road setback on two sides, and a 15-foot road setback on a third side--which gets increased to 50 feet because of a wetland setback. Thus, the building envelope is quite constrained (by my reckoning, it would be about 705 feet x 29 feet at its widest). The ZBA found that the requested variance failed to meet any of the five necessary criteria.

At trial, the judge took a view of the site and ultimately reversed the ZBA's decision, applying the Simplex variance standards. The town appealed, and the Supreme Court affirmed the trial court's reversal of the ZBA decision.

In its opinion here, the Supreme Court reviewed the standards for granting a variance, as well as the recent history of cases ranging from Simplex through Boccia, with special focus on the latter, as that was the case in which the Court established for the first time as law in New Hampshire the concept of a dimensional variance as different from a use variance. Relying on the Bacon concurrence, the Court said that this differentiation was necessary "[b]ecause the fundamental premise of zoing laws is the segregation of land according to uses" and therefore "use variances pose a greater threat to the integrity of a zoning scheme." On the other hand, "the area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by an ordinance." Because of this perceived need to distinguish between use and area variances, the Court established a new standard for area variances. Some characterized this as a relaxation of the variance standard beyond what even Simplex had done. Until the present case, it did not seem that such a conclusion could clearly be made, but Vigeant established that the area variance standard is quite a bit lower than that for use variances under Simplex.

Recall that an understanding of the second prong of the Boccia test remained unsettled. The second prong identifies "the benefit sought by the applicant" as the measure of reasonableness—does this mean that the ZBA should be looking at all hotel alternatives, or just 100-unit hotel alternatives? In Vigeant, the Court has answered this question, sort of. Citing Boccia, the Court said in Vigeant that "the question whether the property can be used differently from what the applicant has proposed is not material. See [Boccia] (sixty-room hotel not viable alternative to presented in opposition to applicant's proposed 100-room hotel)." The problem with this citation is that in Boccia, the Court *never found* that the 60-room alternative was not viable. They only said that it wasn't clear if there were reasonably feasible alternatives, and remanded the case for further proceedings. So the Court was making a reference to a passage in Boccia that simply doesn't exist in that case. But they can do that. They're the Supreme Court. The fact that the statement was never made upon which they're relying here to substantiate a view doesn't matter. What matters is that it is their view, regardless of the source.

Based upon that new-found view, in this case the Court rejected the notion that less intensive alternatives should be examined. So it would be inappropriate here for the ZBA to have demanded some lesser alternative, such as a 3- or 4-unit housing complex. Assumedly, it also would have been inappropriate for the Portsmouth ZBA to have demanded a 60-unit hotel in place of the applicant's proposed 100-unit hotel.

The trouble with this reasoning is that the Court is failing to distinguish among "types" of uses (e.g., multi-family housing, service station, dry cleaner) and "intensity" of uses (e.g., 3-, 4-, or 5-unit multi-family housing complexes; 4, 12, 24 pump service stations; etc.). Using the logic of the Court's opinion here, as long as it's a permitted use, it doesn't really matter what the intensity of it is.

As long as you accept the notion that there should be a difference between use and area variances, it seems that the Court was correct to observe that when considering an area variance,

it is assumed that the proposed use is a permitted one (else, there would be a need for a use variance, too), and that such a use must be assumed to be reasonable. To conclude otherwise would defy logic, as the town would not allow unreasonable uses to be listed as permitted in its zoning ordinance. Of course, this gets back to the problem of distinguishing between type and intensity of uses. A 60-unit hotel might be a reasonable alternative in a situation where a 100-unit hotel is not—but how will you know the difference if the zoning ordinance simply allows "hotels"? Therein lies the benefit of dimensional standards as barriers to excessively intensive use of properties. And therein lies the Court's failure to appreciate how zoning has changed since its inception eighty years ago.

The hidden message in this opinion, to which the Court gives a number of clues, is that there are other criteria for granting a variance. The real problem with the original decision of the ZBA, apparently, is not that they weren't following the Court's Boccia decision (it hadn't been made yet), but that the ZBA did not provide a record of the evidence upon which it relied to find that the other four criteria had not been met. In its glowing recitation of the lower court's proceedings, the Supreme Court quoted the trial court's decision demolishing the ZBA's decision as being "not supported by any evidence." The key, of course, is not to rely only on one of the criteria when making a decision, but to rely on any that have been met or not met, and to substantiate that decision with findings of fact. Although it is the applicant's burden to prove that the criteria have been met, it is the ZBA's obligation to establish a record upon which a subsequent appeal can be made. Failure to do this adequately leaves you open to challenge and loss at trial.

TELLING THE DIFFERENCE

Not All Numbers are Dimensions: Harrington

In an effort to provide further guidance to the state's zoning boards, the Supreme Court again extensively reviewed and refined its hardship criteria in Harrington v. Town of Warner. This case shows the court trying to come to grips with the logistical difficulty it created when it established two different types of variances.

The case involved an existing legally non-conforming manufactured housing park and campground located in a residential zone. The use was permitted in the district, but with a minimum of 10 acres and a maximum of 25 manufactured housing units. The property in question consisted of 46 acres, only twenty-six of which were in use. Although the park met the minimum acreage requirement, it exceeded the maximum number of units, for which it was grandfathered. Lacking sufficient road frontage for two lots, the owner was unable to subdivide the property to create a separate parcel that could meet the acreage requirement and allow for the creation of an additional 25 sites. The owner sought a variance for additional sites on the unsubdivided 46 acres. The ZBA granted the variance, limiting the expansion to an additional

25 sites, to be installed at the rate of five lots per year. Abutters appealed, superior court ruled in favor of the ZBA, and the abutters appealed to the Supreme Court.

First, the Court had to determine if this was an area variance, or a use variance. Turning back to the Bacon concurrence, the Court said,

> A use variance allows the landowner to engage in a use of the land that the zoning ordinance prohibits. Use variances pose a greater threat to the integrity of a zoning scheme because the fundamental premise of zoning laws is the segregation of land according to uses.
>
> An area variance is generally made necessary by the physical characteristics of the lot. In contrast to a use variance, an area variance involves a use permitted by the zoning ordinance but grants the landowner an exception from strict compliance with physical standards such as setbacks, frontage requirements, height limitations and lot size restrictions. As such, an area variance does not alter the character of the surrounding area as much as a use not permitted by the ordinance.
>
> The critical distinction between area and use variances is whether the purpose of the particular zoning restriction is to preserve the character of the surrounding area and is thus a use restriction. If the purpose of the restriction is to place incidental physical limitations on an otherwise permitted use, it is an area restriction. Whether the variance sought is an area or use variance requires a case-by-case determination based upon the language and purpose of the particular zoning restriction at issue. Accordingly, to resolve this question, we must interpret the Town's zoning ordinance to determine the purpose of the zoning restriction.[13]

Here, the Court concluded that because the size of a manufactured housing park is limited in size, irrespective of the underlying acreage (the 10 acre minimum is a mere threshold) or other physical attributes of the property, then

> ...the restriction limits the intensity of the use in order to preserve the character of the area. . . .
>
> Thus, the overall zoning scheme reveals an intent to segregate land by both the types of uses and the intensity of the use. Accordingly, given the language and purpose of the

[13] Observe that, as before in Boccia, the Court again fails to appreciate the significant changes that have taken place in planning and zoning over the last two decades. Much of the energy and thought behind "smart growth" ideas is based on the importance of ***mixing uses***, not keeping them separate. The Court's reasoning here, and upon which it created a new legal standard in Boccia, is based upon an archaic view of planning and zoning practice. The Court's "critical distinction" ignores the fact that such practices as performance zoning and form-based codes don't deal with uses so much as they deal with design, which is fundamentally based on the dimensional standards that the Court believes to be "incidental" to zoning.

> zoning ordinance, we conclude that the provision limiting the number of sites to twenty-five is a use restriction.

But remember that in Vigeant, the Court expressly stated that the ZBA could not have required a less intense use of the property. The Court's approach could lead to nonsensical conclusions: is an explosives facility on over 1,600 acres a more intense use of land than a house, a barn, and two horses on three acres? Is a manufactured housing park of 25 units on 50 acres the same intensity of use as a manufactured housing park of 25 units on 10 acres?

Owner's Finances: *Show Me the Money!* Bacon, Boccia, and Harrington

After the confusion left in the wake of both Boccia and Vigeant, the court attempted to clarify what it meant by "landowner's reasonable use of the property." This question is focused on whether the variance is necessary to avoid an undue financial burden on the owner. Relying on guidance from other jurisdictions, the Court said

Although the Supreme Court has repeatedly and consistently refused to recognize "self-created" hardships as meeting the standard for a variance, since the Bacon concurrence it has been increasingly willing to listen to the pleas of property owners describing the cost of meeting the terms of the zoning ordinance. In Bacon, you'll recall that there were several alternatives for the location of the heating system installed by the owner (the fact that it was already installed in violation of the ordinance was irrelevant—*that's* a self-created hardship!). Justice Duggan's special concurrence in that case reveals the importance of financial considerations:

> The second factor that is useful in determining whether the zoning restriction interferes with the landowner's reasonable use of property is the economic impact of the zoning ordinance. This factor is important because of the relationship between variances and the determination of whether land use controls amount to a taking for constitutional purposes. "[T]he variance was originally conceived as a means to ensure the constitutionality of zoning ordinances . . . by building in a mechanism that would avoid imposing hardship on individual landowners." …. The United States Supreme Court has recognized economic impact considerations as critical in deciding whether land use controls amount to a taking for constitutional purposes. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (articulating factors that courts must consider including the economic impact of the action on the landowner and the effect of the action on the landowner's reasonable investment-backed expectations); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (finding a per se taking when no economically viable use remains in the property). Because the variance is designed to operate as zoning's constitutional "safety valve," the determination of when a reasonable use is restricted so as to create an unnecessary hardship should reflect the same factors as constitutional takings claims, including the economic impact factor.

> Many States include economic impact as a factor in determining whether a landowner has established unnecessary hardship for a variance. See 7 P. Rohan, Zoning and Land Use Controls § 43.02[4], at 43-42 (2003). One of the first and most widely followed formulations for a variance included a requirement that the landowner show that the land in question cannot yield a reasonable return if used only for a purpose allowed by the zoning ordinance. See Otto v. Steinhilber, 24 N.E.2d 851 (N.Y. 1939). In addition, financial considerations, while not expressly mentioned in Simplex, have always been a part of variance determinations in New Hampshire. See, e.g., Carter v. Derry, 113 N.H. 1, 4 (1973) (considering evidence of original cost, current market value and decline in value).
>
> In evaluating the economic impact factor with respect to area variances, zoning boards and courts will not grant a variance merely to avoid a negative financial impact on the landowner. See Rathkopf, supra § 58:5, at 58-27, 58-28. Moreover, there "must be a showing of an adverse effect amounting to more than mere inconvenience." Travers v. Zoning Bd. Of Review of Town of Bristol, 225 A.2d 222, 224 (R.I. 1967) (quotation omitted). At the same time, to obtain an area variance, the landowner need not show that without the variance the land will be rendered valueless or that the landowner will not get a reasonable return on the landowner's investment. See Simplex Technologies, 145 N.H. at 730. In other words, the landowner need not show hardship amounting to confiscation. Cohen, supra at 334. Instead, in considering whether to grant an area variance, courts and zoning boards must balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in Simplex.

This passage has carried forward in the Court's majority opinions in both Boccia and in Harrington. In Boccia, the Court explained:

> The second factor is whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. Stated another way, this factor examines whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for variances. In many cases, there will be more than one method available to implement a landowner's proposed use.
>
> … we also consider whether an area variance is required to avoid an undue financial burden on the landowner. …

Looking at such undue financial burdens, the Court is not interested in the personal financial situation of the owner. Rather they want zoning boards to examine the financial burden on the landowner in general—the cost of compliance with the zoning ordinance, weighed against the relative expense of available alternatives.

In Harrington, the property in question could have been subdivided if the owner built a new town road, thereby providing adequate road frontage to meet the zoning requirements for two

parcels.[14] Although the Court rejected the owner's unsupported statement that he might have to let the property revert to the prior owner if he wasn't allowed to expand the manufactured housing park, they did accept the owner's unsupported statement that "constructing a road that would provide adequate frontage is 'almost impossible' because of the current location of the campground, the existing mobile home park and the presence of swamp lands." Why does one conclusory statement work and not another? The important difference is that the first statement relates to the owner's situation; the second relates to the situation of the property in its surrounding environment, and that was deemed adequate by the Court.

The Other Criteria (Remember Us?)

Always bear in mind when judging a variance application that there are other criteria beyond "mere" hardship. With Simplex's and Boccia's lowered bar for demonstrating hardship, the other criteria deserve a second look.

Although the decision is muddied by a special concurrence and a dissent, Bacon was not decided on the hardship issue. Remember, Bacon led to the area variance. In fact, the Court devoted a great deal of language to the spirit of the ordinance, however, the concurrence wanted hardship to be the issue:

"The Variance Will Not be Contrary to the Spirit of the Ordinance"

As the hardship criterion has become more difficult to apply, this criterion has become more important to zoning boards. Consider the Court's treatment of the 4-foot by 5.5-foot shed in a 50-foot setback in Bacon. Despite the small size, the Court supported the ZBA's holding that it violated the purpose because of the potential cumulative impact of multiple variances and the environmental sensitivity of the lake. These are the fundamental purposes of environmentally-based buffers and to impact them will likewise usually conflict with the spirit and intent of the ordinance.

"By Granting the Variance Substantial Justice Would Be Done"

> "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other

[14] Remember that the Court had determined that the Harrington case involved a use variance because of the intensity of the activity; if the owner had simply applied for a variance to allow subdivision of the property with insufficient road frontage, that probably would have qualified as an area variance.

> qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance."[15]

The notion of substantial justice is fundamentally a balancing test that should get to the fairness of the ordinance in light of particular circumstances—but this sounds like hardship, doesn't it?

"Granting the Variance Would Not Be Contrary to the Public Interest"

Here, the applicant simply must show that there will be no harm to the public from the grant of variance. Although in some circumstances it may be difficult to "prove a negative," in most cases a simple conclusory statement from the applicant that the public interest is not harmed may be sufficient to find that granting a variance would be O.K. (on this criterion, anyway).

But note that the Court addressed how to identify the public interest in Chester Rod & Gun Club v. Chester[16] that considerations of the "public interest" and the Simplex use variance prong related to "injury to the public rights of others" are all "coextensive," and are related to the requirement that the variance be consistent with the spirit of the ordinance. [Ed. Then why have separate criteria?] In Gun Club, the Court stated that a variance would be contrary to the public interest if it would threaten the public health, safety, or welfare.

"Granting the Variance Will Cause No Diminution of Surrounding Property Value"

As with the others this criterion is fact specific, but it is also one that many people—angry abutters in particular—feel they can hang their hats on, because it is something that is capable of numerical calculation. But even as those abutters introduce testimony that their property values would be adversely affected by the proposed use, it is likely that a variance applicant can also produce an expert who would testify to the contrary. These are issues of fact that the ZBA must weigh, in part by determining the credibility of the testimony, and in part by relying on their personal knowledge. This, after all, is the purpose of the zoning board of adjustment.

[15] The Board of Adjustment in New Hampshire - A Handbook for Local Officials, NH Office of Energy and Planning, revised January 2005.
[16] __ N.H. __ (2005-201), decided September 2, 2005.